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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1079

MARITIME OVERSEAS CORP., and INTERCONTINENTAL BULK TANK CORP.,

Petitioners,

against

HEROLD O. LINABARY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1974

No.

MARITIME OVERSEAS CORP., and INTERCONTINENTAL BULK TANK CORP.,

Petitioners,

against

HEROLD O. LINABARY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above case.

Opinions Below

The only pertinent opinion rendered was the memorandum opinion of the District Court denying the respective motions of each party for judgment notwithstanding the verdict. This decision is unreported but appears in the appendix * herein at page 9a.

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* a-refers to the appendix herein. A-refers to the trial appendix.

Jurisdiction

The judgment of the Court of Appeals affirming the District Court was entered on the 21st day of October, 1974 (1a). The orders of the Court of Appeals denying a rehearing and a rehearing in banc were entered on the 2nd day of December, 1974 (p. 3a and 4a).

The jurisdiction of this Court is invoked under 28 USC 1254(1) and 28 USC 2101(c).

Questions Presented for Review

1. Where respondent's medical expert testified that the "likelihood" was that all the damage to plaintiff's knee was caused in an accident for which petitioners were held not liable and further testified there was only a "remote possibility" that surgery could have been obviated following the original injuries, may a jury in a Jones Act case nonetheless speculate that the ensuing surgery was made necessary as a result of petitioners' negligent post accident treatment of respondent?

2. Is not the decision of the Court below, upholding the District Court, an endorsement of the bare or remote possibility standard of medical causation and therefor in conflict with the decisions of this Court and its own decisions of *Fitzgerald* v. *A.L. Burbank & Co.*, 451 F.2d 670, 681 (1971) and *Henry & Braye* v. *A/S Ocean, et al.*, F.2d (January 6, 1975, slip opinion p. 1141, 1152) which uphold a standard of reasonable medical probability?

3. Can this Court's decision of *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959) be interpreted as approving a possibility standard of medical causation as maintained by the Fifth Circuit in *Central Gulf Steamship Corp.* v. *Sambula*, 405 F.2d 291, 301-302 (1968) and fol-

lowed by the District Court and Court of Appeals herein, or should it be based on reasonable medical probability as *Fitzgerald* and *Henry & Braye*, supra have interpreted Sentilles?

Statement of the Case

District Court jurisdiction arose under 28 USC Section 1331 as an action under the Jones Act, 46 USC 688. Jurisdiction in the United States Court of Appeals for the Second Circuit was based on 28 USC Section 1291.

Respondent Herold O. Linabary was a seaman (oiler) in the employ of petitioners who are respectively the manager and registered owner of the s/t *Overseas Alice*. He sued (November 4, 1970) for various knee injuries sustained in a fall on the after deck of the vessel on the night of September 10, 1970. Alleged were the negligence of petitioners and the unseaworthiness of the vessel. Later, and in January 1973, plaintiff amended his complaint to allege a cause of action for aggravation of these injuries. Following trial in May of 1973, the jury ruled in petitioners' favor on the issues of negligence and unseaworthiness relative to the accident of September 10, 1970. It also ruled for respondent on the aggravation issue awarding $50,000, but reducing it by 50% attributable to his contributory negligence (5a-6a).

Petitioners then moved (A407) for judgment n.o.v. on the aggravation issue pursuant to Rule 50(b) FRCP in accordance with their motions for a directed verdict at the close of the evidence (A348) which followed a motion to dismiss this cause of action made at the end of plaintiff's case (A346). This was denied in a memorandum decision of June 1, 1973 by the District Court (9a).*

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* Respondent's motion for judgment n.o.v. on the contributory negligence finding was also denied. His motion seeking to extend his time to file a notice of cross-appeal was denied by the District Court, 376 F. Supp. 688. No appeal was taken from this ruling.

Petitioners, not challenging the proposition that the jury could reasonably have found the vessel's Chief Mate did not give proper or adequate treatment to respondent while aboard the vessel, raised the sole issue on appeal that the jury could not reasonably conclude, as it evidently did, that petitioners' negligence was a proximate cause of the surgery which prolonged plaintiff's recovery, and that a finding to this effect could only have been based on speculation and conjecture.

Following oral argument on October 15, 1974, the Court of Appeals on the 21st of October handed down a memorandum judgment affirming on the District Court's memorandum opinion of June 1, 1973. Petitions for rehearing and rehearing in banc were denied without opinion on December 2, 1974.

The facts

It is not disputed that respondent fell on the after deck of the s/t *Overseas Alice* on the night of September 10, 1970 while on a voyage from Alaska to the San Francisco Bay area. How he fell was the subject of conflicting accounts which the jury resolved in petitioners' favor on both issues of negligence and unseaworthiness (p. 5a). He suffered severe injuries of the left knee which involved the tearing of four ligaments (Dr. Sherman A192).

Following the accident, he came under the care of the vessel's Chief Mate for the next 36 hours or so before the vessel docked. In essence, it was the latter's claimed negligence in failing to immobilize respondent that formed the basis of the aggravation claim. The jury divided the responsibility for aggravation between petitioners and respondent by finding him 50% contributorily negligent.

As indicated, petitioners agreed both in the District Court and in the Court below that the jury might reasonably have found some increase in pain or discomfort for a maximum period to September 28, 1970 when extensive surgery was performed on the left knee.

Petitioners urged in the District Court and Court of Appeals that if the need for surgery arose following the original injuries of September 10, 1970, for which petitioners were exonerated from liability, then they could not be held for the consequences of the surgery which complicated respondent's injuries and increased his disability, pain and suffering.

Thus, as a direct result of the surgery, plaintiff developed a staph infection which Dr. Sherman said (A181) was "disastrous as far as healing is concerned". As a result of the surgery, he was in a cast until December 8, 1970 (Ex. 13, p. 5) and then developed as Dr. Sherman described an "inherent and painful surgical scar". He also found a quadriceps atrophy which he attributed to "the actual accident" and "the prolonged disuse of the knee". Plaintiff's medical expert also found (A187 and A199) that a traumatic arthritis ensued from "the actual accident itself and, two, the injury caused by surgery * * * ". The poor surgical results the first time around made necessary a further surgical intervention in February 1972 (Sherman A188).

With all of the above traceable directly to the original injury or ensuing surgery, petitioners have stressed that their only aggravation responsibility was almost a de minimis one for such pain and suffering which comprised ½ of that over and above the existing non-compensable pain and suffering caused by the original injury, from the date of first treatment on September 11 to the date of surgery, September 28, 1970.

Accordingly, if surgery were necessary in any event, the jury could not have awarded $12,500 ($6,250) under questions 4(c) and (d) (p. 5a) for future pain and suffering from the date of the verdict, May 4, 1973. Similarly, the $5,000 ($2,500) for the lost wages, to the date of the verdict under 4(e) and (f) (p. 6a) should have been stricken since anything after September 28, was attributable to surgery, and irrespective of improper treatment, respondent could not have possibly worked between September 12, 1970 (when paid off) and September 28, 1970 (surgery). Further, the jury could not have awarded $20,000 ($10,000) for future lost wages under 4(f) and (g) (p. 6a).

The only segment of the jury verdict which would have to be apportioned would be 4(a) and (b) (p. 5a) "pain, suffering and disability to date" $12,500 ($6,250). This would cover the entire period from September 11, 1970, when first treated, to the date of the verdict May 4, 1973 but should have been limited to September 11-28, 1970—a fractional part of the total. As to this negligible amount petitioners suggested a remittitur.

The speculative testimony

The testimony upon which the District Court, the Court of Appeals and respondent rely to sustain the verdict on the aggravation issue is that of Dr. Harry Sherman, plaintiff's medical expert. Petitioners' medical expert, Dr. Vincent Lodico, testified unequivocally (A292):

> "Q. Given an initial injury of that nature doctor would surgery have been mandated? A. Absolutely.

(A293):

> Q. What is the reason for that opinion Doctor? A. A tearing of these structures renders the knee

unstable, and no form of treatment except a surgical repair of the torn ligaments will suffice to restore the knee joint to stability so that the patient could walk.

The Court (A320):

Q. What you are saying is that all of the damage was done at the time of the initial impact, the time of the initial injury.

The Witness: That's right, your Honor.

The Court: And the surgical treatment that was thereafter given was required in any event.

The Witness: For that very injury that occurred when he fell down.

The Court: And the fact that he was not immobilized did not mean that he would not have required the surgery.

The Witness: Oh, no. He had to have every procedure that was done on him, just the same."

The opinion of the District Court (9a) said of Dr. Sherman

"Admittedly his testimony contained contradictions, but there was sufficient evidence, if believed, to permit a finding that defendant's conduct was the proximate cause of the aggravation of plaintiff's injuries, including the surgical procedures."

It is submitted that while there were contradictions* in Dr. Sherman's testimony and while not as unequivocal as

* The principal "contradiction" was between his first report of May 10, 1972 (Ex. I), which pre-dated the aggravation amendment, and said "The accident as described above is a competent proceeding cause for the injuries of the left knee which necessitated the treatment (surgery) outlined above", and his trial testimony which said prompt immobilization might possibly have avoided surgery.

Dr. Lodico's on the subject, both medical opinions are on the same side of the ledger. Dr. Sherman's testimony varies only insignificantly between direct and cross-examination.

Recovery here should not be predicated on Dr. Sherman's ritualistic and generalized response to a lengthy hypothetical question or direct examination that the treatment afforded aboard the vessel (A176) "would materially aggravate or worsen the condition of Mr. Linabary's left knee", since he immediately undermined whatever probative value this may have had in his response to the next question which gave the basis for his opinion. He stated (A176):

> "First torn ligaments and torn cartilages heal very poorly, at best, without surgery. However, there is a possibility of healing and this healing to take place, must be done when the joint is immobilized."

• • •

(A176-177):

> "Assuming that such a healing might possibly have taken place in Mr. Linabary, it is obvious that the manner in which he pursued the next two weeks* or so after the injury did not allow for such optimum conditions for healing."

Petitioners objected to the conjectural nature of this testimony (A178):

> "Mr. Byrn: I also object on the grounds that this is highly speculative. The doctor himself said there was a remote possibility of healing."

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* Corrected to two days. (A178)

Here it is submitted the trial court initiated the error continued through the shipowner's motion to dismiss his cause of action at the end of plaintiff's case (A346), for a directed verdict (A348), and in the decision denying the motion for judgment notwithstanding the verdict (p. 9a).

(A178):

> The Court: The doctor is expressing an opinion as he stated it with reasonable medical certainty.

Actually, all Dr. Sherman said with reasonable medical certainty was that there was a very poor chance of healing soundly without surgery and this possibility, if it existed, was removed by the failure to immobilize plaintiff or curtail weight bearing on the knee. This is far from saying with reasonable medical certainty or, as more currently employed, reasonable medical probability that surgery would have been obviated by proper treatment.

Dr. Sherman's testimony on cross-examination shows an almost total rejection of the proposition that negligent aggravation had anything to do with the need for surgery (p. A207):

> Q. I believe that you said that with respect to this aftermath of the original accident that the possibility was remote that healing would take place in any event; is that an accurate statement? A. Yes, it is.

He also conceded the likelihood that all the damage to plaintiff's knee was caused by the original accident (A208):

> Q. Since the possibility of healing is remote, would you say that the likelihood was that all the damage was caused in the original accident? A. The likelihood is yes, but if there were any chance

at all of healing, my opinion was as I stated in answer to Mr. Tabaks question that it was eliminated by the use of the knee.

Dr. Sherman candidly admitted (A209):

A. However, I have no way of knowing whether it would actually have healed or not. I can't possibly tell you that this particular distance in time from the accident.

(A222):

Q. Doctor, your testimony is that the usual case healing is not possibly in any event, is that right? A. I did not say that. That is not my testimony at all.

Q. What is your testimony? A. My testimony is that healing is possible but that in injuries of the severity of Mr. Linabary's, it is not a good possibility but the possibility exists.

Q. It is remote? A. That is right.

Q. You used the word, 'remote'? A. Yes, that is correct.

How conjectural this testimony becomes is further dramatized by his concession that by going down five sets of ladders into the engine room, after the original accident, it was "possible" that the "remote possibility" of averting surgery had already been eliminated before respondent reported to the Chief Mate for treatment.

(A219-220):

Q. The criterion then is that he should receive the treatment as soon as possible? A. That is right.

Q. Therefore he should not have gone down five sets of ladders into the engine room right after the accident. A. No; he should not.

Q. And the possibility of healing might have been foreclosed by the very expedition into the engine room. A. It's possible.

It is submitted therefore that the differences between the testimony of Dr. Sherman and Dr. Lodico were insubstantial, differing only in degree. In sum Dr. Sherman said the "likelihood" was that all the damage was caused by the original accident. Dr. Lodico said that this definitely was so and surgery was indicated right from the start. Dr. Sherman testified that torn ligaments cartilages heal "very poorly at best" without surgery and that he had "no way of knowing" this long from the injuries whether they would have healed or not without surgery. He agreed that with injuries of the severity of Mr. Linabary's the chances of healing represented only "a remote possibility".

Thus, the jury was permitted to make a random selection of a remote possibility without any reason for doing so other than having the door of possibility cracked open for them.

REASONS FOR GRANTING THE WRIT

I.

Against the decisions of this Court and the decision of *Fitzgerald* v. *A. L. Burbank & Co.*, 451 F.2d 670, 681 (2 Cir. 1971) reaffirmed in *Henry & Braye* v. *A/S Ocean*, F.2d (January 6, 1975, slip opinion, (pp. 1141, 1152) the District Court and the Court of Appeals have permitted a jury verdict based on speculation, conjecture and possibility.

This Court has never equated speculation and possibilities with probative evidence. In *Atchison, Topeka and Santa*

Fe Railway Co. v. *Toops,* 281 U.S. 351, 354 (1930). This Court concluded (p. 357):

> "If allowed to sustain the verdict it would remove trial by jury from the realm of probability, based on evidence, to that of surmise and conjecture."

In *Galloway* v. *United States,* 319 U.S. 372, 395 (1943) this Court stressed:

> "the essential requirement is that mere speculation be not allowed to do duty for probative facts."

See also *Tennant* v. *Peoria and Pekin Union Railway Co.,* 321 U.S. 29, 32 (1944).

In *Moore* v. *Chesapeake and Ohio Railway,* 340 U.S. 573, 576 (1951), this Court noted that disbelief of testimony "would not supply a want of proof". Similarly, here jury disbelief of the opinions of plaintiff's medical expert, Dr. Sherman, as to the "remote possibility" or unlikely contingency that respondent could have avoided surgery following the original accident, would be as said (p. 578):

> "speculation run riot. Speculation cannot supply the place of proof."

Other decisions of this Court refer to the "probability" standard of proof of causation, *Dezon* v. *American President Lines, Ltd.,* 318 U.S. 660, 661 (1943); the "balance of the probabilities" *McAllister* v. *United States of America,* 348 U.S. 19, 22 (1954); the jury may elect from among a choice of "probabilities" *Rogers* v. *Missouri Pacific Railroad Co.,* 352 U.S. 500, 506 (1957).

In *Sentilles* v. *Inter-Caribbean Shipping Corp.,* 361 U.S. 107 (1959), relied upon by the District Court there was

language (p. 109) as to the "most likely causes of the aggravation of the tuberculosis" and the "accident probably aggravated his condition".

There are no indications to this day that this Court will allow a jury verdict to stand when its underpinnings are only speculation, conjecture and possibilities. Justice Frankfurter made this clear in a memorandum accompanying a denial of certiorari in *Elgin, Joliet & Eastern Railway Co.* v. *Gibson*, 355 U.S. 897 (1957):

> "Not until this Court explicitly holds that in 'F.E.L.A. cases speculation, conjecture and possibilities suffice to support a jury verdict', which is the holding of the Court of Appeals in this case, 246 F.2d 834, 837, is that to be assumed to be the law of this Court."

In 1960, this Court was challenged directly by the Court of Appeals for the First Circuit, *Henagan* v. *New York, New Haven and Hartford Railroad Company*, 272 F.2d 153, 157 (1959) to acknowledge that it had sired a "barest possibility of causation" standard in F.E.L.A. cases. This Court had no difficulty in itself directing the entry of judgment n.o.v. on grounds of insufficiency of evidence. *New York, New Haven and Hartford Railroad Co.* v. *Henagan*, 364 U.S. 441 (1960).

Over the years, this Court has followed a rule of reason which it is submitted cannot by definition accommodate a standard where poor or remote possibilities are speculated upon. This becomes especially true when all the medical testimony reveals that the likelihood or probabilities are the other way.

In *Fitzgerald* v. *Burbank & Co.*, 451 F.2d 670, 681 (1971), the Second Circuit followed the guidelines laid

down by this Court. Substitution of only a few words show the close applicability of that opinion to the case at bar.

> "The plaintiff could have made out a prima facie case on the issue of causation if he could have introduced sufficient evidence to show that Graser's (Linabary's) condition, when he entered the hospital, was such that there was a *reasonable probability* that proper care would have prevented (avoided) his death (surgery)." (Emphasis added)

In discussing the latitude given the jury the Court went on to say, p. 681:

> "But of course, the jury is not permitted to speculate on proximate cause in the absence of reasonably persuasive proof that the negligence was the probable cause, of the injury, see *Sentilles, supra,* 361 U.S. at 110, 80 Ct. 173." (Emphasis added).

Fitzgerald was reaffirmed by the Second Circuit in *Henry & Braye* v. *A/S Ocean,* F.2d (January 6, 1975, slip opinion 1141, 1152).

> "Braye, of course, was obligated to offer some reasonable proof that his injuries were proximately caused by the shipowner's breach of duty. *Fitzgerald* v. *A. L. Burbank & Co.,* 451 F.2d 670, 681 (2d Cir. 1971). Direct medical testimony of causation need not be introduced in every case, *Sentilles* v. *Inter-Caribbean Shipping Corp.,* 361 U.S. 107, 109-10 (1959). But a jury 'is not permitted to speculate on proximate cause in the absence of reasonably persuasive proof that the negligence was the probable cause of the injury,'' *Fitzgerald, supra* at 681."

II.

Petitioners urge this Court to resolve the conflict in interpreting *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 109 (1959) as to the quality of medical proof of causation between the "possibility" standard of the Fifth Circuit, followed by the panel of the Court of Appeals herein, and the "probability" standard of the *Fitzgerald* and *Henry & Braye* decisions in the Second Circuit.

Petitioners cannot be faulted for failure to call the *Fitzgerald* case to the attention of both lower courts. Petitioners' memorandum to the District Court on the application for judgment n.o.v. stated:

> "Perhaps the closest authority on the subject is *Fitzgerald* v. *A. L. Burbank*, 451 F.2d 670, 681 (2 Cir. 1971)."

Notwithstanding its apparent relevance, the District Court neither discussed nor cited this authority. *Fitzgerald* was again urged and with the same emphasis on the Court of Appeals in petitioners' main and reply briefs. After rendering its memorandum judgment on October 21, 1974 affirming on the opinion of the District Court of June 1, 1973, petitioners filed a petition for rehearing and rehearing in banc.

Petitioners noted that the Court had now adopted the memorandum opinion of the District Court. In so doing, the Court of Appeals had approved the District Court's interpretation of *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 as rendered by *Central Gulf Steamship Corp.* v. *Sambula*, 405 F.2d 291, 301-302 (5 Cir. 1968). The latter rejected a reasonable medical probability standard of

causation in a seaman's injury case and assumed and approved a "possibility" standard. It was pointed out to the Court below that as opposed to *Sambula*, the *Fitzgerald* decision set up guidelines for a re-trial based on a "reasonable probability standard" (see p. 681 of 451 F.2d). In so doing, the *Fitzgerald* court was expressly interpreting *Sentilles.*

Thus, it appeared to petitioners that the Second Circuit in *Fitzgerald* and the Fifth Circuit in *Sambula* had reached contrary conclusions from their respective readings of this Court's decision in *Sentilles* with *Sambula* going off on "possibility" and *Fitzgerald* on "probability". Since *Fitzgerald* had been pressed upon the District Court and the latter saw fit to disregard it and reach into the Fifth Circuit to follow *Sambula* (with an exact page citation to "possibility"). Petitioners could only conclude that its opinion was an advised omission and a covert rejection of *Fitzgerald.*

With the Court of Appeals expressly adopting the District Court's opinion (2a) the same conclusion must be reached as to it. Petitioners therefore requested on rehearing that the Court acknowledge that it had now overruled its prior *Fitzgerald* decision so that this Court might now hopefully resolve the confusion as to what medical standards of proof are to be applied in the thousands of Jones Act and F.E.L.A. cases in the lower courts throughout the federal judicial system. As earlier indicated, the Court of Appeals denied the applications for rehearing and rehearing in banc without comment on the 2nd of December, 1974.

While the Court below has declined petitioners' invitation to say so and neither Court seems inclined to even mention it by name, it seems self-evident that both the District Court and the Court of Appeals have rejected the *Fitzgerald* interpretation of *Sentilles.* The confusion be-

comes compounded when it is seen that another panel of the Second Circuit has in the interval, pointedly reaffirmed the *Fitzgerald* interpretation of *Sentilles* in *Henry & Braye* v. *A/S Ocean, et al.*, — F.2d —, January 6, 1975, slip opinion p. 1141 at 1152.

Thus, we are presented with the anomaly of the Second Circuit re-establishing the *Fitzgerald* "reasonable probability" view of *Sentilles* in *Henry & Braye, supra,* while less than three months earlier adopting the District Court's opinion which ignores *Fitzgerald* and cites the Fifth Circuit *Sambula* "possibility" interpretation of *Sentilles.*

Under the circumstances, petitioners request this Court to clarify its *Sentilles* opinion, since not only is there a conflict between the Fifth and Second Circuits, but one within the Second Circuit. In so doing, it should not escape this Court that in *Sentilles* there was medical testimony as to "most likely causes" and that "the accident probably aggravated his condition", 361 U.S. at 109.

It is also noteworthy that in *Elgin, Joliet and Eastern Railway* v. *Gibson,* 355 U.S. 897 (1957) at least Justices Frankfurter and Harlan promised that if and when this Court held that "speculation, conjecture and possibilities" would suffice to support a jury verdict, it would say so explicitly. Presumably, if the standard of "reasonable medical probability" had been abrogated by the *Sentilles* majority and a "possibility" standard set up, we would have heard more from Justice Harlan who joined Justice Stewart, concurring in the result, and especially from Justice Frankfurter who dissented solely on administrative grounds and who, only two years before had, with Justice Harlan, expressed himself rather forcefully on the point in the *Elgin* case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari herein be granted.

Dated: February 26, 1975

Respectfully submitted

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APPENDIX

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of October, one thousand nine hundred and seventy-four.

Present:

HONORABLE JOHN A. DANAHER
HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. MULLIGAN
Circuit Judges.

73-2103

—o—

HEROLD O. LINABARY,
Plaintiff-Appellee,

against

MARITIME OVERSEAS CORPORATION and INTERCONTINENTAL BULK TANK CORP.,
Defendants-Appellants.

—o—

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment of the Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on Judge Weinfeld's memorandum opinion dated June 1, 1973.

/s/ JOHN A. DANAHER
/s/ WILFRED FEINBERG
/s/ WILLIAM H. MULLIGAN

Order Denying Rehearing by Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of December, one thousand nine hundred and seventy-four.

Present:

HON. JOHN A. DANAHER,
HON. WILFRED FEINBERG,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

73-2103

—o—

HEROLD O. LINABARY,
Plaintiff-Appellee,

against

MARITIME OVERSEAS CORPORATION and INTERCONTINENTAL BULK TANK CORP.,
Defendants-Appellants.

—o—

A petition for a rehearing having been filed herein by counsel for the Defendants-Appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

Order Denying Rehearing *in Banc* by Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the city of New York, on the second day of December, one thousand nine hundred and seventy-four.

73-2103

—o—

HEROLD O. LINABARY,

Plaintiff-Appellee,

v.

MARITIME OVERSEAS CORPORATION and INTERCONTINENTAL BULK TANK CORP.,

Defendants-Appellants.

—o—

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Chief Judge

Irving R. Kaufman

Jury Verdict—May 4, 1973

Linabary v. *Maritime Overseas Corp. and Intercontinental Bulk Tank Corp.*, 70 Civil 4831 .... 5/4/73

1. Do you find that Linabary has established his claims of unseaworthiness? [answer yes or no] NO

2. Do you find that Linabary has established his claim of negligence because of failure to provide a reasonably safe place to work? [answer yes or no] ..... NO

3. Do you find Linabary has established his claim of aggravation of injuries based upon alleged negligent failure to furnish adequate medical aid? [answer yes or no] ..... YES

If your answer to all of the above questions is no, you proceed no further.

If your answer is yes to any of the above questions, you answer the following:

4. Has the plaintiff sustained his burden of proof as to:

   (a) pain, suffering and disability to date? [answer yes or no] ..... YES

   (b) if your answer is yes, what is the amount of damages? $12,500

   (c) future pain, suffering and disability he is reasonably likely to sustain? [answer yes or no] ..... YES

   (d) if your answer is yes, what is the amount? $12,500

Jury Verdict—May 4, 1973

(e) loss of wages from the date of the accident to the present [answer yes or no]	YES
(f) if your answer is yes, what is the amount	$5,000
(g) future loss of wages he is reasonably likely to sustain? [answer yes or no] ..	YES
(h) if your answer is yes, what is the amount reduced to present worth?	$20,000
5. What is the total amount of damages?	$50,000
6. Did the defendant sustain its burden that plaintiff contributed to the accident? [answer yes or no]	YES
7. If the answer is yes, what percentage?	50%
8. Deducting the percentage from the total amount of damages referred to in 5, what sum do you find plaintiff is entitled to recover? ..	$25,000

Judgment of the District Court—May 14, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73,447

—o—

HEROLD O. LINABARY,

Plaintiff,

against

MARITIME OVERSEAS CORPORATION & INTERCONTINENTAL BULK TANK CORP.,

Defendant.

—o—

The issues in the above entitled action having been brought on regularly for trial before the Honorable Edward Weinfeld, United States District Judge, and a jury, on May 1, 2, 3 and 4, 1973, and the Court having submitted the attached special verdict to the jury, and the jury having answered the said special verdict as indicated thereon, and the jury having returned the special verdict in favor of the plaintiff in the amount of $50,000, and the jury having also found that the plaintiff contributed to the negligence to the degree of 50% thereby reducing the amount of the award to $25,000, it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiff, Herold O. Linabary, have judgment against the defendants,

Judgment of the District Court—May 14, 1973

Maritime Overseas Corporation & International Bulk Tank Corp., in the amount of $25,000.

Dated: New York, N. Y.
May 7, 1973

/s/ THOMAS E. ANDREWS 5/16/73
Clerk

A TRUE COPY
THOMAS E. ANDREWS, Clerk

By /s/ E. A. BECKER
Deputy Clerk

APPROVED:

/s/ EDWARD WEINFELD
United States District Judge

Memorandum Decision of the District Court— June 1, 1973

MEMORANDUM DECISION OF THE HON. EDWARD WEINFELD

(JUNE 1, 1973)

70 Civil 4831

The respective motions are denied.

The defendant acknowledges that the "jury could reasonably have found the Chief Officer did not give proper or adequate treatment to plaintiff," but argues there was insufficient evidence upon which the jury could have awarded the amount of damages based upon the testimony of the medical expert, Dr. Sherman. Admittedly, his testimony contained contradictions, but there was sufficient evidence, if believed, to permit a finding that defendant's conduct was the proximate cause of the aggravation of plaintiff's injuries, including the surgical procedures. *Cf.* Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959); Central Gulf S.S. Corp. v. Sambula, 405 F.2d 291, 301-02 (5th Cir. 1968); *see also* Armstrong v. Commerce Tankers Corp., 423 F.2d 957, 959 (2d Cir.), *cert. denied*, 400 U.S. 833 (1970); Evans v. S. J. Groves & Sons, 315 F.2d 335, 349 (2d Cir. 1963). The evaluation of his testimony, in the light of its contradictions, was for jury determination.

Plaintiff's motion also is denied. As to question 6 of the special verdict, obviously this was inadvertent as to plaintiff's third claim, and the word "accident" should have been omitted. The question should have been phrased: "Did the defendant sustain its burden that plaintiff was guilty of contributory negligence?" However, the plaintiff (and the defendant) failed to call this obvious error to the

Court's attention. *Cf.* Cundiff v. Washburn, 393 F.2d 505, 507 (7th Cir. 1968); Kirkendoll v. Neustrom, 379 F.2d 694 (10th Cir. 1967); Martin v. United Fruit Co., 272 F.2d 347 (2d Cir. 1959); Filipek v. Moore-McCormick Lines, Inc., 258 F.2d 734, 736 (2d Cir. 1958), *cert. denied*, 359 U.S. 927 (1959); Fed. R. Civ. P. 51. Moreover, there can be no doubt that the jury fully understood the Court's charge on the issue and that it properly applied the doctrine of contributory negligence.

Finally, plaintiff's contention that, as a matter of law, he could not have been contributorily negligent is without merit.

Dated: New York, N. Y.
June 1, 1973

/s/ Edward Weinfeld
United States District Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1079

MARITIME OVERSEAS CORP., and INTERCONTINENTAL BULK TANK CORP.,
Petitioners,

against

HEROLD O. LINABARY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SHELDON TABAK
Counsel for Respondent
Herold O. Linabary
299 Broadway
New York, New York 10007

ROLNICK TABAK EZRATTY
AND HUTTNER
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1079

MARITIME OVERSEAS CORP., and INTERCONTINENTAL BULK TANK CORP.,

Petitioners,

against

HEROLD O. LINABARY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The unreported memorandum opinion of the District Court, entered June 1, 1973, appears in Petitioners' Appendix, page 9 (a). The judgment of the Court of Appeals, decided without opinion on October 21, 1974, affirming the District Court, appears in Petitioners' Appendix, page 1 (a). The orders of the Court of Appeals denying a rehearing and a rehearing *in banc* were entered on December 2, 1974, and appear in Petitioners' Appendix, pages 3 (a) and 4 (a).

Jurisdiction

Respondent agrees with petitioners' jurisdictional statement. No issue is presented on this point.

Questions Presented for Review

1. Is the decision of the Court below, upholding the District Court, a precedent-setting endorsement of a possibility standard of medical causation?

2. Does the decision of the District Court and of the Court of Appeals create a precedent-setting conflict between the Fifth and Second Circuits and, therefore, manifest inconsistent interpretations of the decision of this Court in *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959)?

Statement of the Case

Respondent does not agree with the statement of the case as presented by the petitioners. It is argumentative and not supported by either the evidence or the latitude given the jury in interpreting the evidence. It is necessary, however, for respondent to discuss the merits of petitioners' version of the case.

Our position in this Court as in the Court below is that there was evidence from which the jury might have reasonably concluded that negligent aggravation rendered surgery mandatory and that in the absence of such negligence, plaintiff's injuries would have healed spontaneously without surgery. Additionally, in the test for causation as applied in FELA and Jones Act cases, the jury only need have found that petitioners' negligence played a part, even the slightest, in producing the injury.

The facts

On September 10, 1970 respondent, an oiler aboard the s/t OVERSEAS ALICE, fell on the after deck sustaining serious injuries to the left knee. Following the accident he was

under the care of Chief Mate Papalios until the vessel docked some thirty-six or so hours later.

Concerning the specific events which transpired during this period of treatment aboard the vessel, the jury heard testimony of the respondent, Chief Mate Papalios and Third Engineer Cadek. They also evaluated certain documentary evidence which included the vessel's Medical Log, Accident Report and Ship's Medicine Chest.

On September 12, 1970, the vessel docked at Martinez. Respondent was discharged and reported the same day to the United States Public Health Service Hospital, San Francisco. Following an examination, X-rays and the application of a soft cast, respondent, not fit for duty but fit for travel, was advised to report to a Public Health facility near his home, Tacoma, Washington.

On September 23, 1970, respondent reported to the United States Public Health Service Hospital in Seattle where surgery was performed on September 28, 1970. Following the surgery, a staph infection developed which both complicated the injuries and increased disability, pain and suffering. As a result, respondent was in a cast until December 8, 1970. Treatment in Seattle continued until August 13, 1971. Next, respondent became a patient at the United States Public Health Service Hospital Outpatient Clinic, Manhattan, New York, and the United States Public Health Service Hospital, Staten Island, New York. A second surgical attempt followed on February 15, 1972, which, as Dr. Sherman stated (A188), "involved cutting away three tendons that come down the inside and back of the leg and normally insert or attach to the inside upper end of the tibia or shin bone."

Following a three month rehabilitation period respondent was again examined by Dr. Sherman on May 8, 1972, and on April 9, 1973. His opinion, stated with a reasonable degree of medical certainty (A203-204), was that "he still

had a severe derangement of the left knee joint following the two operations, and first, of course, the injury. He had a markedly lax medial collateral ligament. He had a lax anterior cruciate ligament. He had traumatic arthritis of the left knee and a severe atrophy of the left thigh and left calf musculature, despite exercise . . . that the atrophy would not improve materially with further exercise, that the arthritis would grow worse with the passage of time and that he was—in my opinion he would never be able to return to work aboard ship, although he would have an earning capacity for work on shore."

While petitioner states that the jury might reasonably have found *some* increase in pain or discomfort due to negligent aggravation during the period September 11, to September 28, they could also have found a *great increase.* Further, no medical evidence compelled a finding that September 28, had to be the cut-off point. They could just as reasonably have concluded that additional pain and discomfort due to negligent aggravation continue into the future. Considering the September 28, surgery as a time reference, it is apparent that all pain and discomfort leading up to it was caused by the initial injury and the aggravation resulting from the failure to properly treat. Looking beyond, into the future, the cause of pain and disability are the initial injury, the negligent aggravation and the unsuccessful surgery. How then can petitioner confidently limit the causative effects of its negligence to a two and one-half week period (September 11-September 28, 1970)?

The non-speculative evidence

Although no statement of fact appears in the memorandum opinion upon which a determination as to which evidence sustained the aggravation issue, petitioner is confident that the source lies in Dr. Harry Sherman. We disagree. Dr. Sherman and Dr. Lodico, medical witnesses

at the trial, were not aboard the ship at the time of the accident; their opinions were the result of information from various sources, which included actual examination of the plaintiff, medical records, and second-hand knowledge of the accident and subsequent events aboard the vessel. On this latter source, the respondent, the Chief Officer and the Third Engineer gave testimony in parts consistent, in parts conflicting. While Dr. Lodico testified that the damage to the knee was caused by the initial impact, the Chief Mate, the ship's medical officer, testified that he observed only light swelling and that he had treated this type of injury many times before.

(A233):

DIRECT EXAMINATION

"Q. Did you also indicate in that report what condition you found when you examined him? A. Well it is on the front over here. Light swelling around the left knee.

Q. Light swelling around the left knee? A. Yes.

Q. That's what you saw? A. Yes.

Q. That was your best judgment of what you saw on his left knee. A. Yes.

Q. If you saw heavy swelling you wouldn't put light swelling, would you? A. No, sir. Well I have no reason to put lies on the injury report."

The Chief Officer had treated this type of injury many times before.

(A252):

CROSS EXAMINATION

"Q. When he reported to you at that time, did you go to the book to determine what treatment he should have? A. Well, I went to the book, medical book and I didn't even have to look in the medical book because that happens many times on ships and I knew the treatment."

(A253-254):

> "Q. You know everything in this book? A. Well, I don't know everything in the book but when I am in doubt I look at the book. That happens to me many times. I bump my knee myself, and I use the same treatment."

(A257):

> "Q. Did you examine and compare both knees? A. Yes.
>
> Q. And from your comparison of both knees, you said it was a little swollen? A. Yes."

A permissible inference that the jury could have drawn from this testimony was that the initial injuries to the knee may not have been as severe as Dr. Lodico categorically stated had to occur immediately upon the initial blow and, further, that healing without surgery may have followed had proper medical treatment followed. Dr. Sherman's report of April 11, 1973 (plaintiff's Ex. 22) provided a medical basis for such an inference:

> "Many injuries of the knee joint involving medial meniscus and medial collateral ligament will go on to spontaneous healing with proper treatment. Many doubtless require surgery despite proper treatment; however, lack of such proper treatment almost certainly changes a potential non-surgical condition into an absolutely surgical one."

We urge that the jury could have accepted this aspect of the Chief Mate's testimony and still found him negligent. It was for the jury to determine what a reasonable Chief Mate would have done under circumstances described as "light swelling". They were not bound to accept the custom and practice of the trade. Further, we point out that, with the plaintiff being under the Chief Mate's care

for thirty-six hours following the accident, the jury could have found negligent conduct in *any number of events in which* the Chief Mate participated. Plaintiff testified that he requested hospital privileges and complete rest, that he was required to go up and down stairs to the mess hall, back and forth to the bathroom, that he was denied the use of a cane or crutch, that he was instructed to use hot epsom salts and compresses,[1] that finally he had to make several trips without assistance in removing all his gear from the vessel. All of the above events were incorporated into a hypothetical question put before Dr. Sherman upon which he was asked:

(A171-176):

> "Q. Doctor, with a reasonable degree of medical certainty, do you have an opinion as to whether or not the facts as I have asked you to assume, aggravated the condition of the left leg and left knee?"
>
> * * *
>
> "Q. Do you have an opinion? A. My answer is yes. I do have an opinion.
>
> The Court: That you can express with reasonable medical certainty?
>
> The Witness: Yes, sir.
>
> Q. Doctor, if I repeated the same question in pertinent parts, do you have an opinion whether or not the conditions caused an increase in pain and disability? A. I have an opinion as to that, also.

---

[1] The adverse effect of this treatment was brought out in cross-examination of Dr. Sherman. (A215).

> "Q. Let me ask you, do you agree with this statement: 'Mild massage with a liniment is also of value though usually less effective than heat?' A. . . . As a matter of fact, if it it not done properly, it may make it worse.
>
> The Court: I was going to say it may aggravate a condition, is that right?
>
> The Witness: It may, it frequently does, your Honor."

Q. Will you please state your opinion with a reasonable degree of medical certainty? A. My opinion is first, the facts which you gave me would increase pain and disability. Secondly, on the facts as you gave me, it would materially aggravate and worsen the conditions in Mr. Linabary's left knee."

(A192):

"Q. Doctor, without repeating the hypothetical question again, in your opinion and with a reasonable degree of medical certainty, were the facts I asked you to assume earlier the competent producing cause for necessitating the operations and treatment as you outlined up until this time? A. Yes, they were."

It is submitted that both the Court below and the District Court were correct in their opinion that sufficient evidence did exist to permit a finding that petitioners' conduct was the proximate cause of the aggravation of the respondent's injuries.

Reasons for Denying the Writ

I. Where the criteria for acceptance of certiorari in FELA and Jones Act cases are lacking, and no basis exists upon which to argue conflicts with a decision of this Court and between the Second and Fifth Circuits and, further, where the sole question presented is the sufficiency of evidence, certiorari should not be granted.

The memorandum opinion of the District Court affirmed by the Court of Appeals for the Second Circuit states only a conclusion of law without supporting facts. No basis exists to determine the principle of law upon which it is founded. Therefore, a discussion of conflicts with an opinion of the United States Supreme Court as well as between and within circuits is inappropriate and premature.

A review of the great number of FELA and Jones Act cases in which the Supreme Court reviewed the sufficiency of evidence relating to an employer's negligence as the cause of an injury or death, examined within the guidelines of Rule 19 (Supreme Court Rules), might very well lead one to conclude that the Court has expended considerable effort outside the normal scope of its business. However, a fair reading of these cases decided indicates that a consistent policy underlies the generous granting of certiorari. We believe this policy is rooted in both an awareness that the intent of the Act is to provide liberalized recovery, consistently demonstrated by an almost unbroken string of decisions favorable to the employee,[2] and a recognition by certain members of the Court that a Seventh Amendment Constitutional question is at issue, *Rogers* v. *Missouri*, 352 U.S. 500 (1957); *Inman* v. *Baltimore & Ohio R. R.*, 361 U.S. 138, 146 (1959), dissenting opinion per J. Douglas; *Harris* v. *Pennsylvania R. R. Co.*, 361 U.S. 15 (1959). Concurring opinion per J. Douglas, Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA*, 69 HARV. L. REV. 1441 (1956); Comment, *Federal Employees Liability Act—Certiorari Practice—Review of the Sufficiency of Evidence*, 6 VILL L. REV. 549, 553 (1961); Note, *Federal Employers Liability Act, Apostasy of Sufficiency of Evidence Policy*, 4 MISS L. J. 418, 421 (1971).

If the above considerations be sufficient to explain the policy in granting certiorari, it then becomes significant that in the instant petition, all such considerations are lacking. Stated in its most simplistic elements, the matter now before this court represents nothing more than petitioners' dissatisfaction with a jury finding that its negligence

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[2] During the period 1938 through 1954, 260 petitions for certiorari in FELA cases were filed; 149 dealt with sufficiency of evidence issues; 37 petitions were granted and the Court approved the removal of the case from the jury in only 5 cases and, in each, the decision was 5 to 4. Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA*, 69 HARV. L. REV. 1441 (1956).

caused respondent's injuries. Although petitioner has presented the matter in the form of legal conflicts between the Second and Fifth Circuits, within the Second Circuit and with a decision of this Court, closer appraisal will reveal that a proper foundation to support this contention does not exist.

We take the position that before one can discuss the legal principles of a case (on any level much less in a Supreme Court forum) one must determine the underlying principle or ratio decidendi. It is the ratio decidendi which forms the authoritative element of the case. Lacking such an authoritative element, the case represents no precedent. Much has been written on the proper methed of determining this authoritative element.[3] There is, however, a common theme which involves the relationship between the *facts* and the *conclusions* of a case as written in a judicial opinion. We submit that there must exist a written opinion stating not only a conclusion but also the facts. It is here that we take issue with petitioners' attempt to mold, shape, or otherwise present the proceedings in the Courts below as full-dressed legal conflicts. As correctly stated by petitioner, the only pertinent opinion to result from the barrage of legal activity below was the memorandum opinion of District Judge Weinfeld. We point out that this opinion contained only two sentences of significance to the petitioners' cause:

"Admittedly, his testimony contained contradictions, but there was sufficient evidence, if believed to permit a finding that defendant's conduct was the proximate cause of the aggravation of plaintiff's injuries, including the surgical procedures. (opinions omitted) The evaluation of his testimony, in the light of its contradictions, was for jury determination."

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[3] For an informative discussion of this topic see Goodhart, *The Ratio Decidendi of a Case*, 40 YALE L. J. 161 (1930).

It is abundantly obvious that Judge Weinfeld did nothing more than to state conclusions. All that can be fairly said is that he found that contradictions existed but that sufficient evidence also existed to submit the case to the jury. Nowhere does he state any facts forming a basis for his conclusion. The facts supporting petitioners' entire legal analysis presented here as well as in the Courts below have been supplied by petitioner! By appending these selected facts to the conclusions in the memorandum opinion, petitioner has now skillfully attempted to raise it to a precedent-setting stage, exhibiting conflicts not only with this Court but on inter and intra circuit levels. In effect, we have a novel situation in which the case posture as presented has been created through the efforts of the petitioner *and* the District Court Judge, the one supplying the facts, the other the conclusions of law.

We suggest that this approach is an unacceptable method of seeking certiorari, lacking in many respects the clearness and sharpness of legal issues needed for Supreme Court review. We further suggest that what occurred in the Second Circuit, namely, an endorsement of the District Court memorandum opinion, does not raise the opinion to a precedent-setting level. The Second Circuit endorsement can in no way be said to stand for a possibility standard proposition. We urge that before this Court accept a petition requesting that a "conflict" between circuits be resolved, it first assure itself that true conflict exists as authoritatively embodied in the opinions of the respective circuits and, further, that the issues at the heart of the alleged conflict have been squarely presented to and clearly decided by the respective circuits.

Intrinsic to our analysis of the proceedings below are two deductions:

1. Factors supporting Supreme Court certiorari policy in granting FELA and Jones Act petitions are lacking; and

2. Inter and intra circuit conflicts as well as a conflict with an opinion of this Court cannot be intelligently dis-

cussed on the strength of the two sentence memorandum opinion.

If we are correct in our analysis, then the single issue remaining is whether certiorari should be granted to review a judgment where the sole issue is the sufficiency of evidence necessary for a jury determination, and the only persons to be affected by the outcome are the petitioner and respondent.

On this point, we are not without authority, for this Court has addressed itself to this issue consistently expressing the opinion that the Supreme Court of the United States will not grant a writ of certiorari merely to review the evidence or inference drawn from it. *General Talking Pictures Corporation* v. *Western Electric,* 304 U.S. 175 (1938); *Southern Power Company* v. *Northern Carolina Pub. Service,* 263 U.S. 508 (1924); *United States* v. *Johnston,* 268 U.S. 220 (1925); *National Labor Relations Board* v. *Waterman S. S. Corp.,* 309 U.S. 206 (1940).

II. The decision of the District Court and of the Court of Appeals creates no conflict between the Fifth and Second Circuits and, therefore, does not manifest inconsistent interpretations of this Court in *Sentilles* v. *Inter-Caribbean Shipping Corp.,* 361 U. S. 107 (1959).

Petitioner maintains that the Court below, upholding the District Court, endorsed a remote possibility standard of medical causation in conflict with the decisions of this Court and its own decision of *Fitzgerald* v. *A. L. Burbank & Co.,* 451 F. 2d 670 (2nd Cir. 1971), and *Henry & Braye* v. *A/S Ocean et al.,* Nos. 73-2153, 73-2868 (2nd Cir., Jan. 6, 1975). In addition, petitioner claims that this Court's decision of *Sentilles* v. *Inter-Caribbean Shipping Co.,* 361 U.S. 107 (1959), needs to be clarified as to whether it stands for a possibility standard of medical causation allegedly approved by the Fifth Circuit in *Central Gulf Steamship Corp.* v. *Sambula,* 405 F. 2d 291 (5th Cir. 1968),

and allegedly followed by the District Court and Court of Appeals herein, or a probability standard pursuant to *Fitzgerald* and *Henry & Braye.* Thus, petitioner asserts a conflict of circuits. Petitioner juxtaposes the possibility standard with jury speculation.

Assuming that the decisions of the District Court and Court of Appeals are precedent-setting, which they are not, petitioner nevertheless has created a conflict between circuits and within the Second Circuit where no conflict exists. Both circuits have followed a liberal standard of causation in line with *Sentilles,* which is clear in its language and intent. Emphasizing the labels "possibility", "probability", and "speculation" is misleading and contrary to the meaning of *Sentilles.* Assuming, arguendo, that such labels are appropriate, there is nonetheless no conflict.

Petitioner has chosen to limit its quotation from *Sentilles* to "most likely causes" and "the accident probably aggravated his condition". In *Sentilles,* in response to a hypothetical question as to the effect of an accident on the activation of a pre-existing, dormant tubercular condition, one medical specialist stated that the condition of the petitioner therein *might* be a consequence of the accident. Another specialist stated that the trauma and a pre-existing diabetic condition were the likely causes of the activation, *but made the qualification* that he was not able to state "which of the two is more likely was responsible in this instance". Still another medical expert was of the opinion that the accident "probably aggravated his condition", *but made the qualification,* "We don't ever select one item and say it is the cause of the particular aggravation". 361 U.S. at 109 (emphasis added). The Court stated that even absence of medical testimony or lack of medical unanimity is not controlling.

A more careful reading of *Sentilles* thus demonstrates not only the above qualifications and the use of *might* but, more importantly, suggests that such labelling itself is

inappropriate. *"The matter does not turn on the use of a particular form of words by physicians in giving their testimony."* 361 U.S. at 109 (emphasis added).

Sentilles concluded that a case should not be taken away from the jury merely because there are inconsistent and uncertain inferences. 361 U.S. 110.

Petitioner would have us believe that the memorandum decision (9a of Petitioners' Appendix) of Judge Weinfeld, affirmed by the Court of Appeals (2a of Petitioners' Appendix), citing *Central Gulf Steamship Corp.* v. *Sambula,* 405 F. 2d 291 (2nd Cir. 1968), determines the standard of medical causation of the Second Circuit and, thereby, creates a conflict within the Second Circuit and between the Fifth and Second Circuits.

However, the District Court correctly suggests the standard for the Second Circuit by reference to *Armstrong* v. *Commerce Tankers Corp.,* 423 F. 2d 957 (2nd Cir. 1970), *cert. denied,* 400 U.S. 833 (1970), and *Evans* v. *S. J. Groves & Son,* 315 F. 2d 335 (2nd Cir. 1968). Both *Armstrong* and *Evans* not only posit the standard for the Second Circuit in line with *Sambula,* but also demonstrate that the Second and Fifth Circuits need no clarification of *Sentilles.*

In *Armstrong,* the Court, determining that the sole issue upon appeal was sufficiency of evidence, in granting a motion for judgment n.o.v., viewed the evidence in the light most favorable to the party other than the movant, and stated that the test is "whether there is *complete absence of probative evidence* to support a verdict for the movant". 423 F. 2d at 958 (emphasis added). Again, arguendo, if we are to think in terms of "possibility-probability", the Second Circuit standard herein is even more liberal than if it were within the possibility range. It is certainly not confined to probability. Also, it should be mentioned that only where there is no probative evidence, does the jury enter the realm of "sheer surmise and conjecture." 423 F. 2d at 960.

In *Evans*, there was medical testimony that a thrombosis *could be* caused by the injury and that a resultant condition *could* develop. "We think the jury could infer from this evidence, at least *in the absence of proof that such an occurrence was medically impossible*, that in a given case the two causes had cooperated to bring about the result. . . . It is true that no medical expert testified specifically as to the *possibility* of such cooperative causation," 315 F. 2d at 349 (emphasis added). Again, we are, at the most, within the possibility range. See also *Collins* v. *Penn Central Transportation Company*, 497 F. 2d 1296, 1297 (2d Cir. 1974), reaffirming the Second Circuit position in *Armstrong* and *Evans*.

Sambula, in the Fifth Circuit, and *Evans* and *Armstrong* in the Second Circuit, do not stand for differing legal standards of medical causation. *Sambula*, while using the "possibility" label, even quotes *Sentilles* for the proposition that there are no magic words, that a particular choice of words by the physician does not determine a case. Again, for the sake of argument, if we are to use labels, *Evans* and *Armstrong* stand more for "possibility" than "probability." In any case, both circuits give the jury the widest latitude: "'Courts are not free to reweigh the evidence and set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.' *Tenant* v. *Peoria and P.U.R. Co.*, 321 U.S. 29, 35 . . ." *Sambula*, 405 F. 2d at 301, quoting *Sentilles*, 360 U.S. at 110. "A jury's verdict is not likely to be set aside" unless there is no probative evidence. *Armstrong*, 423 F. 2d 959, 960.

In *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 506 (1957), the Supreme Court, in a case involving sufficiency of evidence, held that the test of causation is "whether the proof justified with reason the conclusion that employer negligence played any part, even the *slightest*, in producing injury or death for which damages are

sought" (emphasis added). In addition, the Court observed that the right to a jury determination is paramount, and that special important reasons for a review are present when litigants have been deprived of their right to a jury determination. 352 U.S. at 510.

Petitioner, surprisingly, has placed extraordinary emphasis on *Fitzgerald* v. *A. L. Burbank & Co.*, 451 F.2d 670 (2nd Cir. 1971), and *Henry & Braye* v. *A/S Ocean*, Nos. 73-2153, 73-2868 (2nd Cir. Jan. 6, 1975).

Fitzgerald cites *Rogers* and *Sentilles* for the same propositions which respondent has mentioned herein: Proof of negligence may be based upon an employer playing any part, even the slightest, in producing the injury or death. The jury may decide whether there is proximate cause even in the absence of medical testimony. Also, *Fitzgerald* as does *Armstrong*, states that the jury is not permitted to speculate on proximate cause in the absence of reasonably persuasive proof, but *Fitzgerald* indicates that the jury may, in certain cases, decide the case even counter to medical testimony or causation. 451 F. 2d at 681. Respondent takes no issue with these positions.

On the other hand, petitioner quotes from 451 F. 2d 681 wherein the label "probability" appears. Respondent feels that here petitioner is grasping at straws. *Fitzgerald* is not determinative of the Second Circuit on this point. *Fitzgerald* used the label "probability" in a paragraph discussing a *prima facie* case. 451 F. 2d at 681. It should be noted that *Fitzgerald* does not rely upon nor interpret *Sentilles*, but cites a Fifth Circuit case, *Rewis* v. *The United States*, 369 F. 2nd 595 (5th Cir. 1966), indicating the inappropriateness and futility of petitioners' attempt to create a disparity between the Second and Fifth Circuits based upon the magic words "possibility" and "probability", unless petitioner wishes to concede that *Fitzgerald* misinterpreted the Fifth Circuit and should have adopted a possibility standard in line with *Sambula*. Since *Fitzgerald* is not relying upon nor interpreting *Sentilles*, but is

looking to the Fifth Circuit, wherein petitioner claims the possibility standard exists, petitioner should re-examine its improper emphasis on "possibility-probabality" labels and should look to *Sentilles* for clarity on the use of particular words.

Petitioner maintains that *Henry & Braye,* Nos. 73-2153, 73-2868 (2nd Cir. Jan. 6, 1975), reaffirms petitioners' interpretation of *Fitzgerald.* In *Henry & Braye,* the Court stated that Braye was obligated to offer *some* reasonable proof that his injuries were proximately caused by the defendant. Here, the Court cited *Fitzgerald,* on the issue of speculation. As in *Armstrong,* in *Henry,* "the jury was left with *no* competent proof of causation." *Henry,* slip opinion, page 1153 (emphasis added). Nowhere in the decision does the question of "probability-possibility" arise. *Sentilles* is mentioned for the proposition that that the medical testimony need not be introduced in every case. The liberal Second Circuit standard of *Armstrong* and *Evans* is reaffirmed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

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Respectfully submitted,

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